In the
Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-1225

BYRON L. DORGAN, NORTH DAKOTA
STATE TAX COMMISSIONER,

Petitioner

vs.

THEODORE MESSNER and
MARGARET MESSNER,

Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of North Dakota

REPLY OF PETITIONER TO RESPONDENTS' LETTER IN OPPOSITION TO PETITION

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LETTER IN OPPOSITION TO PETITION

The purpose of this reply is to refute the statements made by the Respondents in their letter of April 8, 1975, addressed to this Court, wherein it was stated that they were waiving their right to file a reply brief in opposition to the Petition for a Writ of Certiorari to the Supreme Court of North Dakota.

However, in this letter of April 8, 1975, the Respondents made the statement that no federal question of substance had been decided by the Supreme Court of North Dakota and that no federal question of substance was involved or decided. Other contentions were also advanced.

Therefore, the Respondents' letter of April 8, 1975, should be considered as a reply brief even though it may not be in strict compliance with the rules and procedures of this Court, thus entitling the Petitioner to reply to the statements and contentions advanced therein.

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CITATIONS

The provisions of the federal and state statutes cited below are reproduced in the separate Appendix filed with the Petition for a Writ of Certiorari to the Supreme Court of North Dakota in the instant matter.

FEDERAL STATUTES:

26 USC 1401
26 USC 1402(b)
26 USC 1402(a)(5)(A)
26 USC 6012
26 USC 6017

NORTH DAKOTA STATUTES:

57-38-01.1 NDCC
57-38-31(2) NDCC

REPLY ISSUES INVOLVED

1. Was a federal question of substance involved or decided by the Supreme Court of North Dakota? We submit that there was.

2. Does this Court have jurisdiction to review the judgment of the Supreme Court of North Dakota? We submit that it does.

STATEMENT

The Respondents in their letter of April 8, 1975, take the position that no federal question of substance was involved or decided by the Supreme Court of North Dakota. The Respondents position being that the questions presented in the lower courts involved only state statutes and the interpretation of an administrative rule of the North Dakota State Tax Commissioner.

The above stated position of the Respondents is not supported by the record in the courts below, the administrative hearing, the appeal to the State District Court and the appeal to the North Dakota Supreme Court. The Respondents in this Court were the Petitioners in the Courts below and it is interesting to note that the Respondents in this Court were always ready, willing and financially able to pursue the issues involved until a ruling in their favor was achieved, a ruling that did not properly address itself to the issues and the federal questions presented.

ARGUMENT

The issues in this case are not solely the issues of state law. Because of the federalizing of the state income tax law (Section 57-38-01.1 NDCC) the provisions of Section 57-38-31(2) NDCC call for the interpretation of federal statutes.

Section 57-38-31(2) NDCC in essence provides that a husband and wife who have income from property or business in which both have an ownership interest may file separate state income tax returns provided the separate income of each is reported in the same way the income would have been required to be reported in separate federal returns. The interpretation of federal statutes is thus required and a substantial federal question is presented.

The Supreme Court of North Dakota did not properly address itself to the issues involved and the federal questions involved. The lower court did not recognize that because of "federalizing" the reporting of income by a husband and wife on separate state income tax returns had to follow the federal statutes and regulations governing the filing of separate federal income tax returns. That is, each taxpayer must report his or her own separate income and that no option existed under federal law that permitted the reporting of income one way for income tax purposes and another way for self-employment tax purposes.

Instead, the Supreme Court of North Dakota determined that the self-employment tax was not a part of the federal income tax, but rather, that it was a separate tax, the return of which was filed with the federal income tax return for administrative convenience only. The Supreme Court of North Dakota

based this belief on its interpretation of the provisions of 26 USC 1401 and 1402(b), imposing the tax and defining net earnings from self-employment, and 26 USC 6017, imposing a duty to file a self-employment tax return, irrespective of whether an income tax return was required under 26 USC 6012.

The Supreme Court of North Dakota misinterpreted federal statutes when it ruled that a taxpayer had the option to claim all the income from property jointly owned with his wife as his self-employment income and that this had no bearing upon his, or her, income tax liability, state or federal, and did not justify the Tax Commissioner treating that election as conclusive for state income tax purposes. Under this interpretation, that the self-employment tax is a separate federal tax, and not a part of the federal income tax, spouses who jointly own property (in non-community property states) may elect to report the joint income from that property jointly for federal income tax purposes and separately as to one spouse for self-employment tax purposes.

The Supreme Court of North Dakota observed that the Federal Internal Revenue Code made provision for a husband to claim all the income in a community property state for self-employment tax purposes, regardless of the fact that the income was equally divided for income tax purposes. (26 USC 1402 (a)(5)(A)) However, the Internal Revenue Code makes no provision whatsoever for the resolution of a similar question arising in a state, such as North Dakota, that does not recognize community property. The failure of the Treasury Department to address itself to the above situation does not warrant the lower court's conclusion that this meant that the federal authorities consider an election

as to self-employment income to be irrelevant as to the right to file joint or separate federal income tax returns.

The lower court's ruling would permit the assignment of income, not only as to a husband and wife, but also as to strangers owning property in joint tenancy. The Internal Revenue Code as enacted does not provide for the assignment of income for purposes of reducing tax liabilities, and the adoption of the Internal Revenue Code and the interpretations thereof by the State of North Dakota through federalizing therefor should restrict the assignment of income for state income tax purposes. This requires the proper interpretation of federal statutes and application thereof by the state courts.

CONCLUSION

It is not only the Petitioner, but thousands of North Dakota taxpayers, including husbands and wives, owning property in joint tenancy and deriving income therefrom, and their tax advisors, that are asking this Court, as our Court of last resort, under exceptional circumstances necessitated by justice and equity, to issue a Writ of Certiorari to the Supreme Court of North Dakota, or remand same back to the Court below with the directive to reconsider the federal question presented and to make a written decision thereon.

Dated this 18th day of April, 1975, at Bismarck, North Dakota.

Respectfully submitted,

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